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No. 79-1070

In the Supreme Court of the United States

OCTOBER TERM, 1979

REFRACTARIOS MONTERREY, S.A., PETITIONER

v.

FERRO CORPORATION AND U.S. INTERNATIONAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF FOR THE UNITED STATES INTERNATIONAL TRADE COMMISSION IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Customs and Patent Appeals (Pet. App. 1a-13a) is reported at 606 F. 2d 966.

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on October 11, 1979. The petition for a writ of certiorari was filed on January 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether the Court of Customs and Patent Appeals had jurisdiction of an appeal from the refusal of the International Trade Commission to review, following termination of the underlying investigation, the decision of its administrative law judge not to release certain discovery materials classified as confidential business information subject to protective order.

STATEMENT

1. Section 337(a) of the Tariff Act of 1930, 19 U.S.C. 1337(a), prohibits "[u]nfair methods of competition and unfair acts" in the import trade when the effect or tendency of such methods or acts is to destroy or substantially injure an efficiently and economically operated United States industry. The International Trade Commission is empowered to investigate alleged violations of Section 337. If the Commission determines that a violation of the statute has occurred, it may exclude the article in question from importation into the United States (19 U.S.C. 1337(d)) or issue a cease-and-desist order (19 U.S.C. 1337(f)). In addition, the Commission has authority to exclude articles during the course of an investigation in cases where it determines that there is "reason to believe" that the statute has been violated (19 U.S.C. 1337(e)). Persons "adversely affected by a final determination of the Commission under subsection (d), (e), or (f) may appeal such determination to" the Court of Customs and Patent Appeals ("CCPA"). 19 U.S.C. 1337(c).[1]

[1]Section 337 was amended on July 26, 1979, by Section 1105(c) of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 311. The text of Section 337 set out in the appendix to the petition (Pet. App. 15a) does not reflect these amendments. Prior to enactment of the Trade Agreements Act, Section 337(c) provided for CCPA review of final Commission determinations to prohibit importation under Subsections (d) and (e), but did not refer to review of cease-and-desist orders issued under the authority of Subsection (f).

2. On the basis of a complaint filed by respondent Ferro Corporation ("Ferro") pursuant to Section 337, the Commission on February 3, 1978, instituted an investigation of alleged unfair methods of competition and unfair acts in the importation and sale of certain ceramic tile setters (Pet. App. 2a-4a).[2] The Commission's notice of investigation listed six unfair acts or methods of competition allegedly committed by petitioner and two other firms named in the Commission's investigation (*id.* at 4a-5a).

On September 11, 1978, the Commission terminated the tile setters investigation on the ground that none of the six unfair acts and unfair methods of competition enumerated in its notice of investigation remained to be adjudicated (Pet. App. 6a). The Commission observed that Ferro had failed in its prehearing statement to set forth in detail, and was thus deemed to have abandoned or withdrawn, any alleged unfair acts and unfair methods of competition other than that of patent infringement (*id.* at 5a). The Commission also observed that Ferro had filed a disclaimer with the Patent and Trademark Office pursuant to 35 U.S.C. 253, thereby effectively removing patent infringement as an issue in the investigation (*id.* at 5a-6a).

Approximately one month prior to termination of the investigation, petitioner filed a motion with the presiding administrative law judge of the Commission ("ALJ")

[2]Tile setters are box-shaped devices used to support flat ceramic tiles during firing in a kiln (Pet. App. 4a).

seeking the declassification of certain depositions and exhibits thereto (Pet. App. 6a). During discovery, these materials had been classified as confidential commercial information subject to a protective order (*id.* at 6a-7a). After Ferro and petitioner were able to agree upon the declassification of a portion of the materials in controversy, petitioner on September 1 filed a supplemental motion to declassify the remaining documents (Pet. 4; Pet. App. 7a).

On September 27, 1978, the ALJ issued an order denying petitioner's motions to declassify (Pet. App. 7a). On October 6, 1978, petitioner filed a motion for reconsideration, which the ALJ denied on January 12, 1979 (*ibid.*). On January 24, 1979, petitioner filed with the Secretary of the Commission a document denominated "Appeal of Order of Presiding Officer Denying Motion to Declassify" (*ibid.*). On March 6, 1979, the Commission advised petitioner of its decision "not to review the [ALJ's] order * * * denying [the] motion to declassify" and informed petitioner of its recourse to seek release of the disputed materials under the Freedom of Information Act (*ibid.*). Petitioner's subsequent "Petition for Reconsideration" of the Commission's decision was denied, and petitioner was again apprised of its right to request disclosure under the FOIA (*ibid.*).

3. On May 10, 1979, petitioner filed a notice of appeal to the CCPA seeking review only of the Commission's refusal to review the ALJ's order denying release of the confidential discovery documents. No review was sought of the Commission order that terminated the tile setters investigation (Pet. App. 7a). On October 11, 1979, the CCPA dismissed the appeal for lack of jurisdiction, holding that the Commission's action was not a " 'final determination' * * * within the meaning of" 19 U.S.C. 1337(c) (Pet. App. 13a).

ARGUMENT

1. 19 U.S.C. 1337(c) empowers the CCPA to review "final determination[s] of the Commission under subsection (d), (e), or (f)." In turn, Subsections (d), (e), and (f) pertain to orders of exclusion from importation and cease-and-desist orders. Hence, the Commission's refusal to consider the ALJ's ruling on access to discovery materials, in light of the termination of the underlying investigation, is not encompassed within the CCPA's appellate jurisdiction under Section 337(c). As the CCPA concluded (Pet. App. 13a):

> We note that the ITC terminated the investigation and dismissed the case against appellant—actions not challenged by appellant. It seems apparent that there is no "final determination" in this case within the meaning of the statute, nor will there ever be. The Commission will not, in this case, now direct that the tile setters be excluded or not excluded from entry into the United States. The Commission dismissed the action.
>
> The keystone of our subject-matter jurisdiction in this case is simply missing. Without a "final determination," or even the possibility of one ever existing, this court is without authority to review the matters in question.

See also *Import Motors Limited, Inc.* v. *U.S. International Trade Commission*, 530 F. 2d 940, 944 (CCPA 1976) ("that phrase [final determination of the Commission under subsection (d) or (e)] refers to a final

administrative decision on the merits, excluding or refusing to exclude articles from entry under subsection (d) or (e)" (footnote omitted)).[3]

Nor, contrary to petitioner's suggestion (Pet. 11-13), did the CCPA have jurisdiction by virtue of the provision in 19 U.S.C. 1337(c) that "[e]ach determination [by the Commission] under subsection (d) or (e) of this section shall be made on the record after notice and opportunity for a hearing in conformity with the provisions of subchapter II of chapter 5 of title 5 [Administrative Procedure Act (APA), 5 U.S.C. 551-559]." The provisions of the APA incorporated by reference in Section 337(c) pertain to the administrative procedures employed by the agency and do not bear on the issue of judicial review (Pet. App. 11a n.13). Moreover, even those sections of the APA that deal with judicial review (5 U.S.C. 701-706) do not confer jurisdiction on the federal courts. *Califano* v. *Sanders*, 430 U.S. 99 (1977).

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[3]Petitioner contends (Pet. 10-11) that the decision below is inconsistent with *Import Motors*. The CCPA correctly rejected this contention that its own decisions were in conflict (Pet. App. 13a n.15). In *Import Motors*, the CCPA dismissed for want of jurisdiction an appeal to review a nonfinal ALJ order discontinuing the participation of certain companies at the initial stage of a proceeding without prejudice to their subsequent intervention. The court also noted (530 F. 2d at 944 n.9) that a final Commission determination under Subsection (f) would be subject to review even though Section 337(c) referred at that time only to Subsections (d) and (e); in the court's view, the failure to include Subsection (f) was the result of "legislative inadvertence." (As discussed above, Section 337(c) has now been amended expressly to apply to final Commission determinations under Subsection (f).) *Import Motors* is of no assistance to petitioner, for that decision did not dispense with the jurisdictional requirement that there be a final Commission determination under Subsection (d), (e), or (f), a requirement that petitioner fails to satisfy.

2. The ALJ and the Commission acted upon petitioner's declassification request after the investigation in this case had been dismissed. Nevertheless, petitioner has persisted in seeking to invoke the processes applicable to a Commission investigation in order to gain access to discovery materials produced during the terminated proceeding.

As the Commission has repeatedly advised it, however, petitioner's proper recourse would be to pursue its remedies under the Freedom of Information Act, 5 U.S.C. 552.[4] The Court recognized in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975), that a requester's "rights under the [FOIA] are * * * [not] decreased by reason of the fact that it claims an interest in the * * * [requested documents] greater than that shared by the average member of the public." Moreover, a request under the FOIA would not "be extremely burdensome and repetitive" (Pet. 8), and would clearly be less onerous than petitioner's chosen course of moving for reconsideration before the ALJ, twice petitioning the Commission, appealing to the CCPA, and filing for a writ of certiorari in this Court. Finally, in the event its FOIA request is denied, petitioner would be entitled to *de novo* review in the district court (5 U.S.C. 552(a)(4)(B)) with a right of appeal to the appropriate court of appeals.

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[4]The CCPA noted (Pet. App. 10a) the Commission's representation that a request by petitioner under the FOIA "will be granted if the documents it seeks are not business confidential information within the meaning of 5 U.S.C. 552(b)(4)." The ALJ's protective order also stated (Pet. App. 11a-12a n.14) that confidential treatment would be afforded "subject to * * * final ruling, after notice, by * * * [the Commission's] Freedom of Information Act Officer to the contrary * * *."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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